When in Rome - breaking in the taxi services market with new technologies

When in Rome—breaking in the taxi services market with new technologies: the MyTaxi decision of the Italian Competition Authority

Case I810A—Servizio di prenotazione del trasporto mediante taxi—Roma (Provvedimento n 27244), 27 June 2018 (hereinafter referred to as the 'MyTaxi decision')

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1. Introduction

The usage of geolocalisation software aimed at facilitating the access to taxi services is a reality of many cities throughout the world: consumers are increasingly adept at "calling a taxi" by using a smartphone app, as opposed to chatting to a "real person" on a taxi booking line. Thanks to the geolocalisation of the taxis that subscribe to the app, consumers can track the car reserved to them in real time. Taxi drivers can plan their work in autonomy by fielding "calls" directly on their smartphone screen; perhaps more importantly, by relying on the same geolocalisation service, they can utilise any extra capacity that they may have and that may get "lost" in waiting at a taxi rank.

The entry into the market for "taxi despatching" of these new technologies has therefore been beneficial for taxi drivers as well as for customers. However, it has also disrupted existing levels and methods of supply of these transport services, by challenging established incumbents and straining at the edges the existing frameworks for the regulation and licensing of taxi drivers. The recent decision of the Autorita' Garante della Concorrenza e del Mercato ('AGCM'), the Italian competition agency, provides an example of how the commercial practices put in place by incumbent dispatch service providers can hinder the entry of new rivals that rely on these new technologies, to the detriment of both the quality and the quantity of services.[1]

This case comment will proceed as follows: it will outline the facts of the MyTaxi case and the arguments presented by each of the parties. Thereafter it will analyse the AGCM's decisions as to the legality of the practices put in place by the investigated parties. In conclusion, the comment will consider briefly to what extent the decision is consistent with the existing Article 101 TFEU interpretation and whether this approach is appropriate to address the challenges that the entry of new technologies in services' markets (especially regulated ones) are going to face in the future.

2. The decision of the Italian competition authority in MyTaxi

2.1. The facts of the case and the arguments of the parties

MyTaxi Italia is the Italian subsidiary of a German group active in the market for taxi despatch services across several EU member states. In 2016 the company complained to the Italian competition authority that the joint action of three cooperatives active in the same market in the city of Rome had prevented it from expanding on the market for taxi despatch services in that city. MyTaxi alleged that the cooperatives had relied on the use of non-competition clauses in order to exclude new entrants

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[1] The 'MyTaxi decision' is available in Italian at: http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/264D4B0ED3B221FFC12582C6004BBF4E/$File/p27244.pdf.

on the market for taxi despatch services in Rome.[2] By preventing drivers associated to each cooperative or using its services as an "external user" from employing other tools for the despatching of calls from customers at the same time, on pain of being excluded altogether from the organisation or of being precluded from using its services, the investigated organisations (RadioTaxi, Samarcanda and ProntoTaxi) had allegedly infringed Article 101 TFEU.[3]

Samarcanda, ProntoTaxi and RadioTaxi rejected the allegations and countered that the presence of similar clauses in their contracts with all taxi drivers, whether members of the cooperative or merely users if its services was indispensable for the correct functioning of the cooperative and indeed required by the applicable domestic law, namely Article 2527 of the Italian Civil Code. This provision states in subsection 2 that membership of the cooperative is not open to individuals who provide the same services in competition with the cooperative itself.[4] The cooperatives claimed, therefore, that this clause was ancillary to the agreement of association to the cooperatives themselves and as such outwtih the scope of Article 101 TFEU.[5]

2.2. The MyTaxi decision—market definition

The Italian Competition Authority identified as relevant market the market for the provision of services for the collection, management and despatch of taxi services, i.e. the intermediation activity that allows customers to get in touch with taxi drivers with a view to accessing the transport services they need.[6] This service is provided through a number of channels: taxi drivers may decide to operate independently and to seek out customers by stationing at taxi ranks or at kerbside. Alternatively, they can opt for answering calls placed at "columns" placed on the pavement—namely at telephones that are installed at taxi ranks for this purpose.[7] Taxi drivers can also decide to rely on the intermediation services of platforms whose function is to gather the customers' requests for service and to assign them to individual taxis: these platforms can operate via telephone (and hence have a physical presence in an "operation room") or via software apps.[8]

Despatch platforms can be "open" or "closed": open platforms do not preclude users or associates from relying on other tools for the despatch of calls. Users and members of closed platforms instead cannot manage workload through other competing channels. MyTaxi is an open platform: taxi drivers can decide whether to use the app to source new customers or to rely on another platform for this purpose.[9] By contrast, as was anticipated in section 1, the platforms run by the investigated companies were closed ones, since they precluded all users, regardless of whether they were full members or not, from seeking despatch services from another provider.[10]

The AGCM found that all the channels outlined above competed with each other in the provision of despatch and calls management services vis-à-vis taxi drivers as well as consumers. For taxi drivers they all acted as tools for sourcing and possibly expanding their opportunities of work: in this context, the availability of a plurality of channels can be regarded as especially useful since it allows taxi drivers

[2] MyTaxi decision, para. 2-3.
[3] Id., para. 148.
[4] Id., para. 143-147.
[5] Id., para. 143-144.
[6] Id., para. 200.
[7] Id., para. 73.
[8] Id., para. 74-75.
[9] Id., para. 7; see also para. 81-82.
[10] Id., para. 42-43.

to tap into all the existing demand and use more efficiently their time.[11] Having a range of tools through which calls to taxis was despatched is equally beneficial for consumers. They are free to choose which channel to use in order to secure taxi services in light of their preferences and personal circumstances: thus, for instance, a foreign customer in Rome might prefer to use an internationally recognised app to seek out a taxi, thereby abating the language barrier which they would have to face if the only way of doing so had been ringing a taxi booking line.[12]

In light of the forgoing analysis, the AGCM took the view that the market for the despatch and management of calls to taxi drivers was a "two-sided market": from the consumers' standpoint, the market is for taxi transport services, in the context of which they chose which tool to use in order to access these services. For this purpose, customers can choose either to approach a taxi driver directly, e.g. by walking to a taxi rank or hailing a taxi on the road, or to rely on an intermediary in order to place a call to be despatched to a service provider. On both segments many intermediaries compete by reason of the type of service offered and of how it can be accessed. Consumers are free to choose the "best fit" to their needs.[13] For taxi drivers, instead, the decision to choose an app-based over a "traditional platform" service provider is not cost-free: a "traditional platform" involves purchasing and using a radio system and carries sizeable costs as a result.[14] Relying on app-based services is instead far less costly, since it only requires having a smartphone or tablet on which to run the app.[15] In addition, taxi drivers can rely on multiple apps and therefore utilise more efficiently their time by sourcing demand through different channels.[16]

Thus, the AGCM took the view that since the existence of the platforms outlined above is key to the interaction between customers and providers, the way in which competition worked in the intermediation segment had necessarily an impact on the rivalry existing between taxi drivers on the consumer market for the provision of transport services.[17] The more competitive the former segment is, the better placed taxi drivers are as regards managing their time, being able to maximise the number of calls they can attend to.[18] Customers also benefit from a plurality of ways in which to reach out to taxi transport services providers since they can choose the instrument that is most appropriate to satisfy the demand for services in light of their own preferences and circumstances.[19] Accordingly, it was held that the fact that taxi drivers may be able to rely on multiple platforms meant a greater likelihood for consumers to source transport services since consumer demand could be channelled more efficiently to service providers in the absence of barriers to the expansion of the platforms that taxi drivers rely on.[20]

Having so defined the product market, the AGCM proceeded to identify the geographic market for these services as being limited to the city of Rome, due to the territorial nature of the licenses granted to the taxi drivers concerned and to the fact that the traffic affected by the practice in issue had all originated in that local authority's territory.[21] It was emphasised that although MyTaxi, like many

[11] Id., para. 203.
[12] Id., para. 204.
[13] Id., para. 83.
[14] Id., para. 87-88.
[15] Ibid.
[16] Id., para. 202.
[17] Id., para. 201.
[18] Ibid.; see also para. 202.
[19] Id., para. 204.
[20] Id., para. 207.
[21] Id., para. 209.

similar apps, was active in other cities, its geolocalisation meant that taxi drivers, on the one hand, could only provide services to potential customers based in a specific area and customers could only localise taxis present in that limited area.[22]

2.3. The MyTaxi decision—the anti-competitive practice

Having identified the relevant market, the AGCM considered the legality of the association agreements and usage agreements tying taxi drivers to the "traditional" platforms run by the investigated cooperative organisations. At the core of this assessment was therefore the question of whether the non-competition clauses contained in these agreements, taken both individually and as part of a network of similar agreements characterising the provision of taxi services in Rome foreclosed competition, by preventing wholly or in part newcomers from entering this market. In other words, was the non-compete obligation imposed on taxi drivers associated to or merely using the services of the cooperative organisations capable of marginalising, if not altogether excluding from the relevant market new intermediaries, especially those operating "open platforms" such as MyTaxi?

The AGCM acknowledged that in principle non-competition clauses of the kind at issue could contribute to the good functioning of a cooperative organisation and for that reason excluded that these clauses had an anti-competitive object. However, it could not be excluded that they could have anti-competitive effects. [23] In this specific respect, the AGCM observed that while the clauses in question were lawful in light of the Italian Civil Code, it was indispensable to read the relevant provisions in light of and therefore in harmony with the antitrust principles.[24]

The authority observed that the non-competition clauses affected all users of the "traditional" platforms operated by the investigated undertakings, regardless of whether they were members of the cooperatives or were merely users of their services. It also noted that their duration was unlimited and therefore that they could not fall within the scope of the EU Block Exemption Regulation on vertical arrangements.[25] The AGCM emphasised that the entry on to the relevant market of open, app-based platforms that compete with traditional channels for the despatch and the management of taxi services added a new dimension to the way in this market works. It was noted that while some of the characteristic of the market are heavily influenced by regulation (for instance in the way in which prices are determined), competition on grounds other than price plays a very important role for consumers.[26] It was emphasised that the entry on the relevant market of innovative app-based service, which competed with traditional despatch platforms, had exercised significant competitive pressure on the incumbent operators, with important benefits for users on either side of the market.[27]

Taxi drivers on the one hand, were able to optimise the way in which they used their working time at lower costs, given the different way in which app intermediaries were remunerated and the absence of start-up costs. Customers, on the other hand, were able to locate taxis, to secure the services that they needed and therefore to prevent their call remain unanswered due to lack of supply.[28] In addition, app-based platforms often allowed consumers to locate a taxi more quickly, with a consequent reduction of the price payable for the time which taxis would take to reach the

[22] Id., para. 210.
[23] Id., para. 219-220.
[24] Ibid.
[25] Id., para. 221.
[26] Id., para. 227.
[27] See para.226-22; see also para. 229.
[28] Id., para. 232-233.

customers; individual users could also rate the performance of the app every time they used it, thus contributing to future efficiency of the service.[29]

Against this background, the question before the AGCM was whether and to what extent the non-competition clauses that precluded taxi drivers associated with or otherwise using services of the traditional platforms from using competing intermediaries restricted the access to the relevant market on the part of software-based open platforms, in particular by preventing them from operating on the market thanks to its innovative business model.[30]

To answer this question the competition authority relied on the test enshrined in the EU Court of Justice's Delimitis preliminary ruling:[31] thus, the first step was to determine the size of the share of the market that was insulated from outside competition as a result of the clauses in issue and whether its dimension was such as to prevent the entry or expansion of rivals in light of the market's circumstances.[32] The AGCM observed that the relevant market was characterised by the presence of a few competitors, whose market shares had remained constant over time: among them RadioTaxi 350 was the leading incumbent.[33] However, not all taxi drivers adhere to a platform: the decision highlighted that in Rome, a sizeable proportion of active drivers operated independently. On this basis, the AGCM took the view that the tied market share should be calculated not only in light of the number of taxi drivers associated to the traditional platforms, but should also take into account those drivers who operated independently but had not desire to change their approach to the management of demand.[34]

Perhaps more importantly, the decision stated that the share of supply should be calculated not solely on the basis of the number of drivers, but rather, on the basis of the number of journeys that each driver could offer and could therefore be managed through an intermediary (at least in principle).[35] Thus, while the traditional platforms could rely on all the journeys supplied by their associates or users, by virtue of their "closed" nature, innovative intermediaries such as MyTaxi were not in the same position since there were several factors that influenced their ability to attract demand from taxi drivers.[36]

The AGCM observed that not all the taxi drivers who operated independently represented potential customers for the apps: as anticipated above, many of them were not interested in relinquishing their autonomy and therefore, even though, they may have downloaded the app, they may not have sourced any journeys through them at all.[37] As for taxi drivers tied to traditional intermediaries, the decision acknowledged that they could (at least in principle) allocate a certain section of their journeys to clients sourced via the apps: however, it was observed that this was not in practice a viable possibility.[38] It was held that since the use of an innovative platform would have led to a violation of the cooperative agreement, the risk of losing their membership of the traditional platform and the costs associated with it (e.g. the loss of the investment in purchasing the taxi radio) represented sizeable barriers to switching to a different intermediary, thereby consolidating the

[29] Id., para. 233-234.
[30] Id., para. 227; see also para. 235.
[31] Case C-234/89, Delimitis v Henninger Brau AG, [1991] ECR I-935.
[32] MyTaxi decision, para. 235. See Delimitis, cit. (fn. 31), para. 19-24.
[33] Id., para. 236-237.
[34] Id., para. 238.
[35] Id., para. 239.
[36] Ibid.
[37] Id., para. 241; see also para. 242.
[38] Id., para. 243.

leadership position of the traditional incumbents.[39] Thus, the AGCM held that a new intermediary would have faced a scarcity of supply, had it decided to attempt entry in the market for the provision of services of despatch and management of taxi journeys in Rome.[40]

Thereafter, the AGCM applied the second prong of the Delimitis test to the MyTaxi case:[41] it asked therefore whether the non-competition clauses had adversely affected the complainant's ability to entry and expand in the relevant market.[42] For this purpose, the decision identified the percentage of unanswered calls for a taxi that had been lodged via the MyTaxi app as the proxy for the assessment of the foreclosure effect of the incumbents' arrangements vis-à-vis the new entrant.[43]

It was found that since entering the relevant market MyTaxi had struggled to find taxi drivers to fill 50% of the demand for tax services managed through the app: in particular, a chasm existed between the "affiliated drivers" (namely those how had downloaded the app) and the active drivers (i.e. drivers who actually accepted demands for services through MyTaxi) had increased over time. In particular, it was held that since the available taxi drivers were limited in number and those already associated to a traditional intermediary were dissuaded from working with MyTaxi by the concern for losing membership of their cooperative, there was very limited space for the new app to enter and grow in the relevant market.[44]

In light of the forgoing analysis, the AGCM concluded that there was a direct causal link between the investigated parties' agreements and in particular the non-competition clauses they contained and the inability of MyTaxi to satisfy demand for taxi journeys coming from consumers and channelled through the app.[45] In its view, the existence of the non-competition clauses had prevented drivers who are already working with traditional platforms such as the cooperative associations from responding to requests for service coming to them thanks to the MyTaxi app.[46] As a result, MyTaxi had failed to fulfil the requests for taxi services coming from its customer, thus losing out on share of both sides of the relevant market.[47]

2.4. The MyTaxi decision—absence of economic justifications, appreciability and inter-state trade effect

As was illustrated in the previous section, the AGCM found that Radio Taxi, Pronto Taxi and Samarcanda had infringed Article 101(1) TFEU on the ground that, through the non-competition clauses contained in their cooperative association agreements, they had prevented taxi drivers associated with them or using the services they provided from sourcing demand for their services through an open platform such as MyTaxi. As a result, MyTaxi had been incapable of satisfying demand from consumers and had lost ground on the two-sided market for the provision of services of despatch of taxi journeys and demand management for taxi drivers. According to the Italian authority, the non-competition clauses represented restrictions of competition 'by effect' and as such had met the requirements of the Delimitis test. The decision rejected any allegation that the clauses

[39] Id., para. 245; see also para. 246-247.
[40] Id., para. 247; see also para. 271-272.
[41] Delimitis, cit. (fn. 31), para. 25-26.
[42] Id., para. 252.
[43] Ibid.
[44] Id., para. 253; see also para. 255-256.
[45] Id., para. 262.
[46] Id., para. 273-274.
[47] Id., para. 265-266; see also para. 283-284.

in question could have any economic justification: it was held that the objective of ensuring the good functioning of the cooperative association and of providing high quality services could have been achieved without imposing on associated drivers as well as on those merely using the cooperatives' services an absolute ban on sourcing demand through other means, such as MyTaxi.[48]

The AGCM also denied that the non-competition clauses were "indispensable" to attaining the stated objectives, as asserted by the investigated cooperative organisations.[49] In its view, the mutualistic objectives of the cooperative association could have been attained without imposing a an absolute non-compete obligation on all users (regardless of whether they were full members or merely clients of the cooperatives).[50] Nor could it be alleged that these clauses were instrumental to the investigated organisations' ability to monitor the activities of their users and associates. It was stated that attaining this objective was more dependent on the existence of appropriate technologies than on the imposition of an exclusive obligation not to compete with the activities of the cooperative associations' members.[51]

The Italian antitrust authority also rejected the plea that the clauses in question met the requirements for the application of the legal exception enshrined in Article 101(3) TFEU either via the application of the Block Exemption Regulation on vertical restraints or on the basis of an individual assessment. Having regard to the former, the AGCM emphasised that since the investigated parties jointly owned around 50% of the relevant market, they could not rely on the 2014 Regulation on the ground that the exemption was contingent upon holding no more than 30% of the market. In respect of the claim for an individual exemption, the AGCM held that the non-competition pacts, far from producing beneficial effects for consumers, had prevented novel channels for the management of demand for taxi journeys from emerging on the relevant market, to the detriment of the users of these services.[52] For the same reasons, these clauses were found to be able to eliminate competition from a substantial part of the affected market: since they prevented novel, competing rivals from entering the market, they safeguarded, if not expanded, the market share held by the incumbent operators.[53]

The clauses in questions were equally not "indispensable" to attain the mutualistic objectives they aimed to satisfy. The AGCM took the view that an absolute ban on competition of unlimited duration went way beyond what was necessary to satisfy the solidarity-based objectives of the organisations. Since a sizeable proportion of consumers still preferred to use the telephone to call a taxi and taxi drivers could rely on software channels as well as on the traditional radio to source demand through the cooperatives, there were sufficient incentives for associated and user drivers to continue to use the services provided by the investigated organisations.[54]

The decision also addressed questions of 'appreciability' and of whether the clauses in issues had an impact on trade between member states. In respect of the former, the AGCM took the view that each of the three investigated organisations contributed to the foreclosing effect on the relevant market in a different way in accordance with the number of associated taxi drivers and thus of journeys that were "bound" to each organisation. Thus, Radio Taxi's non-competition clause was found to have the most sizeable foreclosing effect of the three arrangements, since the cooperative

[48] Id., para. 267.
[49] Id., para. 268.
[50] Ibid.; see also para. 257, 259.
[51] Id., para. 269.
[52] Id., para. 293-294.
[53] Id., para. 296.
[54] Id., para. 295.

had the largest network of drivers. Samarcanda's clause instead had the most limited impact since this was the smallest cooperative in terms of members' numbers.[55]

Finally, the AGCM addressed the question of whether the arrangements in question could be prejudicial to the flow of trade between member states. The decision emphasised that MyTaxi was part of a multinational group active throughout Europe: thus, the arrangements at issue were able to jeopardise its ability to enter into the Italian market.[56]

2.5. The 'MyTaxi' decision—the remedies

The forgoing sections illustrated the substantive findings of the AGCM as regards the 'MyTaxi' complaint and highlighted that the Italian antitrust authority considered the infringement at issue a violation 'by effect', in light of the Delimitis test. This conclusion had a significant impact on the decision as regards the consequences of the infringement: the AGCM took the view that the practice in issue, which was found to have been of unlimited duration, did not constitute a serious infringement of the competition rules. Accordingly, the NCAimposed no sanctions. The investigated organisations were instead subjected to an obligation to take all measures that are necessary to end the infringement and to abstain from future infringements of the competition rules. The infringing organisations were required to notify the authority of the nature of the activities adopted to fulfil these obligations within 120 days of the decision.

3. The MyTaxi decision: comment

3.1. Challenging incumbents with innovative methods—what about market definition?

The MyTaxi decision provides a good opportunity to reflect on approaches to market definition in cases where a new technology threatens the leadership of "established" competitors. Before the AGCM the investigated parties had argued that the market for intermediation services provided via app should have been regarded as distinct from the market based on "traditional" intermediaries.[57] They had pleaded that there were objective differences between the two markets both in respect to how each of these intermediaries work and to how they fulfil the demands of their users.[58] In particular, one of the investigated organisations had argued that unlike myTaxi, which relied on geolocalisation and on direct payment via app, the traditional intermediaries offered a "complete service" to both drivers and customers: it was submitted that the latter relied on "multiple technologies" for despatching a taxi. Customers could pay in cash as well as through other means and the cooperative associations' call centres could monitor the activities of taxi drivers in real time.[59]

The AGCM however rejected these arguments swiftly: in its view, there was no need to draw a distinction between app-based and "phone-based" intermediary, since both these channels fulfilled the same function.[60] The competition authority emphasised that the practices at issue in the proceedings were primarily concerned with services provided to taxi-drivers. Thus, it took the view that the impact of these practices should have been examined primarily with the needs of this category of users in mind.[61] On that basis, the AGCM held that since for taxi drivers what is central is the ability to maximise the opportunities of work, by securing as many journeys as possible, traditional

[55] Id., para. 288-290.
[56] Id., para. 298.
[57] Id., para. 139.
[58] Ibid.
[59] Id., p. 24, fn. 149.
[60] Id., para. 205.
[61] Id., para. 206.

and app-based tools appear all mutually substitutable.[62] The decision acknowledged that the differences existing between these two types of intermediary could have an impact on consumer choices and thus influence the decisions of taxi drivers. However, this was not regarded as incompatible with the finding that these service providers all belonged to the same relevant market.[63]

It is suggested that the AGCM correctly identified the boundaries of the relevant market, since it focused on the economic function that the services provided by, on the one hand, the investigated cooperatives and on the other hand the complainant aimed to fulfil. The authority acknowledged that this was a two-sided market, in which intermediaries interacted with both businesses and end users. However, it refused to be drawn into any discussion as to whether the non-competition clauses could have an impact also on the consumer segment of this market.[64] Instead, it focused on the question of whether these clauses had actually a foreclosing effect vis-à-vis other intermediaries such as MyTaxi and therefore on the extent to which they affected rivalry between established and new rivals.[65]

It is suggested that a parallel may be drawn with a number of recent competition decisions adopted by other NCAs in respect of online travel agents. Although the remit of this work does not allow for any in-depth examination of the market definition issues in the travel agency industry, it must be noted that just as with the market at issue in MyTaxi, the market for the provision of travel agency services is two-sided. Travel agents deal both with the travelling consumers, who approach them in order to secure accommodation and transport services, and with hoteliers and transport services providers, who rely on this channel as a means of reaching out to consumers and provide services to them.[66]

Traditionally, travel agents are remunerated through commission payable by consumers as well as by service providers in exchange for the intermediation activity provided by the agents. The entry on the market of online travel agents, however, had a significant impact on the way in which the industry had been working. Booking websites are usually free for the consumer to use, with hoteliers and transport services providers, instead, having to pay a commission for the online services they receive.[67] Against this background, the question emerges as to how we can identify the segments of this market if consumers do not bear any price for the services they receive.

Commenting on a recent German decision, Szilagy suggested that this assessment should focus on the nature of the services offered by each website: he argued that traditional and online travel agents were mutual competitors on the ground that they both provided a "comprehensive" service to their consumers, namely "search, comparison and booking".[68] As for the hotels and, it is argued, other service providers, the same agents provided a service of "sending the bookings" made by consumers on their websites or in their offices, usually in exchange for a fee or commission.[69]

Thus, it was found that the market for travel agency services was two-sided; also, in respect of the business-facing segment, the Bundeskartellamt held that both sales channels, namely "traditional"

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[62] Ibid.
[63] Id., para. 207.
[64] See inter alia para. 206.
[65] Ibid.; see also para. 208.
[66] See inter alia, recently, Szilagy, "Online travel agents and competition law", (2018) 39(10) ECLR 436, pp. 439-440.
[67] Id., p. 440.
[68] Id., pp. 440-441. Decision of the Bundeskartellamt, 20 December 2013, B9-66/10—*HRS*, available at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf%3F__blob%3DpublicationFile%26v%3D3, see especially paras. 71-72.
[69] Szilagy, cit. (fn. 69), p. 441; HRS decision, cit. (fn. 68), para. 73.

or online travel agents, were regarded by hotels (especially, it was found, small and medium sized ones) as mutually substitutable.[70] By contrast, other online channels, such as hotel websites, were found to belong to a different market, on the ground that they only served to promote individual hotels or hotel chains with a view to selling their services through an online technology.[71]

It is therefore argued that the approach adopted by the AGCM to the definition of the relevant market conforms to accepted views of demand and supply substitutability, characterising the decision-making practice of other EU competition authorities. In addition, to the extent that it places significant emphasis on the economic function that intermediaries fulfil, in the eyes of their customers, it can be regarded as being "neutral" to the technology being used by the incumbents as opposed to the complainant.[72] This approach can be usefully compared with the one adopted by the Bundeskartellamt in *HRS*, where the competition agency highlighted the nature of the "bundle" of services offered by each intermediary and sought by hoteliers as the decisive factor in the identification of the boundaries of the relevant market.[73]

In light of the forgoing analysis, it can be concluded that the AGCM's approach to market definition in the MyTaxi decision provides a balanced and well-thought through answer to the questions arising from the impact of novel, relatively "disruptive" technologies on an industry characterised by a few incumbents all of which rely on a certain business model in supplying their services. The Italian competition agency placed significant emphasis on the nature of the services provided by the intermediaries and while it was clearly alert to the impact of their behaviour on the consumer segment, it correctly identified the confines of the business-facing market on the basis of a consideration of the economic need that the services in question aimed to fulfil.

3.2. Non-compete clauses as restrictions by effect: from ancillarity to the application of the Delimitis test

Non-competition clauses such as those in issue in MyTaxi are a frequent feature of many commercial arrangements. For instance, when they are included in agreements for the same of a business, they can fall outside the scope of Article 101(1) only if they are found to be both "necessary to the transfer of the undertaking" in issue and "strictly limited" in its duration and scope.[74] As the Court of Justice held in, inter alia, the *Remia* decision, an agreement for the sale of a business was inherently pro-competitive since it would have allowed a new undertaking to attempt to enter and establish itself on the relevant market.[75] However, without a commitment not to compete with the buyer of the business, the vendor could have easily re-entered the market and "won back" his or her erstwhile customers, thus denying the buyer any chance of operating profitably on the relevant market.[76]

Later cases relied on a similar frame of assessment to consider the validity under Article 101(1) of restrictions of competition imposed in order to pursue a public interest objective. In *Wouters* the Court of Justice held that in analysing the lawfulness of the prohibition of multi-disciplinary practices imposed by the Dutch Bar Association on its members, regard should have been had to its "economic

[70] HRS decision, cit. (fn. 68), para. 76-77.
[71] Szilagy, cit. (fn. 66), p. 441. See HRS decision, cit. (fn. 68), para. 73.
[72] See e.g. para. 204 of MyTaxi.
[73] HRS decision, cit. (fn. 68), para. 73.
[74] Case 42/8, Remia v Commission, [1985] ECR 2545, see para. 19 and 31-32.
[75] Id., para. 19.
[76] Ibid.

and legal context" and in particular to the public policy goals that this rule pursued.[77] The Court acknowledged that precluding lawyers from forming multi-disciplinary practices was such as to limit production and development of legal services, especially in cases where the expertise of accountants may have been necessary.[78] However, it took the view that not every restriction on the freedom of action of the affected undertakings was such as to infringe the EU competition rules. So long as its anti-competitive effects were "inherent in the pursuit" of the public interest objectives that the restraint aimed to attain and the restriction in issue did not appear to go beyond what was necessary to secure these objectives, Article 101(1) TFEU would not apply.[79]

The approach adopted in *Remia* and especially *Wouters* can usefully be contrasted with the AGCM's consideration of the non-competition clauses contained in the RadioTaxi, ProntoTaxi and Samarcanda cooperative association agreements. It is submitted that the Italia competition authority adopted a framework for the assessment of these clauses that was broadly consistent with the Court of Justice's view. Thus, it acknowledged that these clauses could not entail a 'by object' restriction of competition on account of pursuing a purpose which far from being injurious to rivalry, sought to uphold a public interest objective (i.e. ensuring the good functioning of cooperative organisations). [80]

However, the decision found that these restrictions went beyond what was necessary to serve their otherwise legitimate function. In this specific context the AGCM took aim at the breadth of the non-competition obligation—which extended beyond the membership to include "mere users" of the cooperatives' services—as well as at its duration, which was unlimited. In its view, the statutory objectives that these clauses pursued could have been attained equally by limiting the non-competition obligation only to those drivers that were members of the cooperative organisations, thus leaving drivers that only used the services of the cooperatives free to subscribe to other despatch services, especially those offered by "open" platforms.[81] To take a more extensive view of the non-competition obligation enshrined in Article 2527 of the Italian Civil Code would have amounted to imposing a disproportionate burden upon those taxi drivers that were associated to the cooperatives under investigation, either as members or as mere service users.[82]

In light of the forgoing, it was inevitable that the AGCM would review the legality of the non-competition clause against the background of the principles governing the assessment of "by effect" cases and in particular on the basis of the "*Delimitis* test". Thus, for the clauses to infringe Article 101(1) it was essential to consider whether the non-competition agreements in question, both on their own and as part of a network of similar arrangements, made it excessively difficult for new entrants to attempt entry or expansion in the market.[83] It is suggested that the AGCM's reliance on the *Delimitis* test, in order to address this question, is consistent with the EU Court of Justice's approach to "less serious" infringements of Article 101 TFEU that occur in arrangements concluded by non-competitors (in this case between despatch platforms and taxi drivers). On this point, it is submitted that a parallel may be drawn between the MyTaxi decision and the 2015 preliminary ruling in the case of *Maxima Latvija*. This case concerned the validity, in light of Article 101 TFEU, of an

[77] Case C-309/99, Wouters, [2002] ECR I-157, para. 97.
[78] Id., para. 90.
[79] Id., para. 97; see also para. 107.
[80] AGCM decision, para. 215.
[81] Id., para. 217.
[82] Id., para. 218; see also para. 221.
[83] See id., para. 224; see also fn. 228.[291

agreement, contained in a commercial leasing deal and allowing lessees to oppose the decision made by their lessor to let premises out to other tenants.[84]

It is suggested that since it subjects the decision of the lessor to let property to a new tenant to the authorisation of existing lessees, the agreement limits the freedom of the lessor to decide how to dispose of its property. It also prevents potential lessees from establishing themselves on the related retail market, by acquiring a physical presence on it, and thus affects their ability to entry and expand on this market, especially by contesting the incumbents' position on the retail market, which the latter have already secured by reason of their ongoing tenancy.[85]

Consequently, it is argued that the arrangement at issue in *Maxima Latvija* is in many ways akin to the one considered by the AGCM in MyTaxi, albeit its object concerns land leasing, since it affects the ability of potential rivals to access and expand on the retail market. In the words of the Court of Justice, these clauses had the potential of "restricting the access of Maxima Latvija's competitors to some shopping centres in which that company operates a large shop or hypermarket".[86] Thus, while they were not so harmful as to be considered restrictions by object, they could certainly have anti-competitive effects.[87] Accordingly, and just as in the MyTaxi decision, the question was whether an agreement of this kind could make it more difficult for new entrants to establish themselves on the same relevant market.[88]

In addressing this question, the Court of Justice, pursuant to its approach in *Delimitis*, took the view that the court seized with the dispute should have taken into account the existence of any regulatory barriers to entry and the availability of commercial land in affected areas.[89] It should also have considered whether it was actually possible for new entrants to identify and lease land for expansion on the relevant market, either in another shopping centre or elsewhere in the geographic market, with a view to assessing whether access to the market was already difficult as a result of these contextual factors.[90] If the answer was affirmative the court should have considered whether the agreement in issue contributed to sealing off this market to an appreciable extent, having regard to the position of the parties on the market and the duration of the agreement.[91] Thus, it is argued that the MyTaxi decision remains consistent, at least in part, with the EU Court of Justice's approach to the assessment of prima facie 'by effect' infringements of Article 101(1) TFEU that affect the ability of rivals to contest access of and expansion on the relevant market. It is submitted that the AGCM developed a convincing theory of harm as well as a strongly articulated analysis of the membership agreements that is based on and is consistent with established EU case law.

It is however, somehow surprising that the AGCM did not impose any financial penalties on the three investigated cooperatives. It is recognised that these arrangements, in principle at least, pursue objectives of public interest, including the concern for the good functioning of mutualistic organisations. However, was it plausible to hold that the clauses at issue in MyTaxi were not sufficiently serious and, consequently, not such as to justify the imposition of any fine? On this point, it must be noted that the AGCM correctly excluded these agreements from the scope of the Block Exemption Regulation on Vertical Restraints on the ground that they constituted "hardcore"

[84] Case C-345/14, SIA 'Maxima Latvija' v Konkurences padome, [2015] ECR I-784; see para. 15.
[85] See e.g. paras. 21-22.
[86] Id., para. 22.
[87] Id., para. 21; see also para. 18-19.
[88] Id., para. 27.
[89] Ibid.
[90] Id., para. 28-29.
[91] Id., para. 29; see also para. 31.

restrictions on competition.[92] They were in fact of unlimited duration and affected all users of the platforms regardless of whether they were members of the cooperatives or not.[93]

Accordingly, it is legitimate to query whether it may have been justified to impose financial penalties on the cooperative organisations, on the ground that their membership arrangements had had a clear impact on future development of the affected industry and had prevented consumers from accessing innovative services. It is suggested that some support for this thesis could be found in earlier case law of the Court of Justice. In the *Barry Brothers* preliminary ruling, for instance, the Court took the view that non-competition clauses stipulated as part of an agreement aimed at cutting production in an industry "in crisis" should also have been considered to be "serious" infringements of Article 101(1) TFEU.[94] Agreeing with the Advocate General's opinion,[95] the Court held the fact that the non-competition clause negotiated as part of the BIDS agreement was limited in time did not detract from the circumstance that this part of the arrangement was functional to rendering the obligation to cut production of beef, which was at the heart of the deal, sustainable over time.[96]

The General Court followed a similar approach in several judgments. Thus, in *SAS*,[97] the Court found that the reciprocal non-competition clause agreed by the parties had reinforced the overall agreement's effects on prices, by preventing rivals from expanding their market presence on a specific air route.[98] On that basis, it confirmed the Commission decision including the financial sanctions imposed on the undertakings responsible for the infringement.[99] In the other *DPF* judgment, the General Court reiterated the nature of the non-competition clause as a restriction by effect[100] and on that basis held that the arrangement had gone beyond what was necessary to achieve the cooperative's objectives.[101] The Court emphasised that due to its unlimited duration and scope the non-competition clause had prevented third parties from having access to the market for "raw", unfinished skins.[102] Importantly, the General Court upheld the fine imposed by the Commission on the applicant and in that context highlighted that the non-competition clause proved the applicant's awareness of its foreclosing effects.[103]

In light of the forgoing, it is difficult to explain the rationale behind the decision of the AGCM not to impose fines on the investigated cooperatives. It is acknowledged that the NCA's approach to cooperative associations' membership agreements remains broadly consistent with the EU Commission's reluctance to target these organisations with the enforcement of the competition rules.[104] However, it is argued that AGCM's position on this issue appears to overlook the actual impact of the non-competition clauses, namely the circumstance that they had prevented the entry in or

[92] See Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L102/1, Article 5(1)(a).
[93] AGCM decision, para. 292-294.
[94] Case C-2019/07, Barry Brothers (BIDS), [2008] ECR I-643, see para. 32-34, 39.
[95] Id., para. 39.
[96] Per AG Trstenjiak, Opinion, [2008] ECR I-467, para. 76; see also para. 61.
[97] Case T-241/01, SAS v Commission, [2005] ECR II-296, para. 80.
[98] Id., para. 127; see also para. 119-120.
[99] Id., para. 122-13; see also para. 164-166 and para. 246.
[100] Case T-1/89, DPF v Commission, [1992] ECR II-1931, para. 73-74.
[101] Id., para. 74.
[102] Ibid.
[103] Id., para. 157-158.
[104] Id., para. 159.

expansion on the relevant market of new, innovative rivals, as well as the fact that as a result demand for their services had remained unmet.[105]

It is submitted that the imposition of a fine would have sent a powerful message to cooperatives that it is possible to stipulate non-competition clauses aimed at ensuring their good functioning. However, these obligations should not go as far as to restrict access to the market and especially as to exclude innovative rivals, whose services could improve consumer experience.[106] It is added that the circumstance that for the AGCM the illegality of the clauses had emerged from recent technological innovation, far from justifying not imposing a fine, should have perhaps been regarded as sufficient reason for deterring similar infringements.

It is concluded that it may have become more difficult for cooperative associations and more generally, for membership organisations to justify the existence of non-competition clauses as part of their membership agreements. It is acknowledged that limiting the members' ability to compete against the organisations responds to the legitimate interest of ensuring the good functioning of these bodies. However, these clauses must be carefully limited in order to avoid conflicting with Article 101(1) TFEU.

4. A tale of taxis, radios and apps: slowly making way for disruptive technologies in regulated markets? Tentative conclusions

Taxi apps are increasingly common among consumers, who rely on these tools either in parallel with or in preference of the traditional phone lines or "simply hailing a cab" on the road. They also provide a fast, low-cost way for taxi drivers to seek out customers. By relying on a variety of despatch platforms drivers can use their time more efficiently, by "filling all gaps" of their working time. The entry into this services' market of these new tools, however, has put pressure on the incumbents and in particular on the established radio-based platforms.

The MyTaxi decision shows how an innovative rival who can provide the same service both cheaply and more flexibly, can challenge the "established" way in which undertakings compete on the relevant market. The decision acknowledges the role of cooperative associations and recognises the need for them to function well for their members and for any driver who may wish to use their services. However, by declaring the non-competition clauses that prevent users from relying on a variety of despatch platforms incompatible with Article 101(1) TFEU, the AGCM has outlawed those platforms that are totally exclusive, thereby paving the way for the entry and expansion on this market of more innovative and efficient rivals.

In light of the forgoing analysis, it is concluded that the MyTaxi decision must be welcomed as a sign of the commitment toward the liberalisation of markets where incumbent undertakings have exerted significant influence on the way in which services should be provided. However, the fact that no fine was imposed on the incumbents might over time "chill" this trend toward greater openness, since it may weaken the deterrent force of the competition rules against established platforms at the expense of new technologies and, more generally, could send mixed messages as to the importance of maintaining open markets.

[105] Id., para. 252, 258-260; see also para. 262-26.

[106] See e.g., mutatis mutandis, case 75/84, Metro v Commission, [1986] ECR 3021, especially paras. 34-36, 38-40.